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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1957

No. 136

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD (parts by operation of law)

Petitioners

against

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

Respondent

PETITION OF PETITIONERS FOR REHEARING

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Petitioners,

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GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

PETITION OF PETITIONERS FOR REHEARING

Petitioners, The Board of Assessors of the Town of Riverhead, and The Town of Riverhead respectfully petition for rehearing in the above entitled matter.

Statement

Petitioners seek a writ of certiorari to review a New York State court judgment ordering to be stricken from Petitioners' assessment roll as illegal and void assessments of taxes on Respondent's lessee interest made and created pursuant to the provisions of the Act of August 5, 1947, 34 U. S. C. secs. 522a-522e.

The State Court proceeding arose by petition filed by Respondent in the New York Supreme Court, Suffolk County, to strike the assessments as illegal and void, and by Petitioners (respondents below) moving to dismiss Respondent's petition as failing to state facts sufficient to

warrant relief. The New York Supreme Court at Special Term denied Petitioners' motion to dismiss and granted Respondent judgment sustaining its petition and holding the assessments illegal, erroneous and void, and ordering them stricken from the assessment roll (R. 60).

Your petitioners appealed to the Appellate Division, Second Department; and that Court reversed four to one (R. 78-79; Appendix to Petition, pp. 39-40).

Respondent then appealed to the Court of Appeals of the State of New York; and that Court reversed four to three and reinstated the Special Term judgment (Appendix to Petition, p. 54). On motion by Petitioners for reargument or in the alternative to amend the remittitur, the Court of Appeals denied the motion for reargument, but granted the motion to amend the remittitur and certified as presented and passed upon a question under the Constitution and statutes of the United States and worded in the Court's own language.

Petitioners filed timely petition for certiorari, which this Court denied by order of October 14, 1957. Petitioners now petition for hearing under Rule 58, par. 2.

Grounds for Rehearing

1. This is a case in which Federal and State laws are so interwoven that the *State* law can not be an independent subject matter of interpretation or decision in the case unaffected by the *Federal* law (cf. *Abie State Bank* v. *Bryan*, 1931, 282 U. S. 765, 773). It is a case wherein it cannot be said that the New York Court's interpretation of *New York* law was wholly free from an erroneous interpretation of *Federal* law and of this Court's decision in the *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, 190-191 case (cf. *Rayonier Inc.* v. *United States*, 1957, 352 U. S. 315, 320), or of the rights and obligations of Respondent and beneficial rights of Petitioners under Respondent's Federal contract.

It is a case, moreover, in which, because the *State* law interpreted with the *Federal* is peculiar to the State of New York, litigation elsewhere so as to produce a resulting direct conflict with the decision of the New York Court of Appeals is either impossible or highly improbable; and this is reason for granting rehearing of the petition for certiorari (cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, wherein first certiorari had been denied, 303 U. S. 639; then rehearing had been denied, 303 U. S. 667; but later motion for leave to file a second petition for rehearing was granted and certiorari granted, 304 U. S. 587; and see also *Muncie Gear Co.* v. *Outboard Co.*, 1942, 315 U. S. 759, 766).

That such as a ground for rehearing is not confined to patent cases such as the *Schriber* and *Muncie Gear* cases is clear from this Court's citing the *Schriber* case in Rule 58, par. 2, when it amended the Rule, then Rule 33, on October 13, 1947 (332 U. S. 858), to illustrate instead its present broad specification of "other substantial grounds available to petitioner although not previously presented" (Rule 58, par. 2).

2. The conflict *in* the New York Court of Appeals, and among the lower State court justices—i.e., with the Court of Appeals divided 4—3, in reversing the divided 4—1 Appellate Division decision, which had reversed Special Term, and with the total of 13 State court justices and judges thus having divided 7 *for* and 6 against your Petitioner—shows more than would a decision from another jurisdiction involving another State's differing statutes the "doubtful validity" of the Court of Appeals decision (cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, *supra*, 305 U. S. 47, 50) under and as respecting the Federal statute (34 U. S. C. sec. 522e) Federal contract and Federal decision (*United States* v. *County of Allegheny*, *supra*) affecting the New York law. Compare *Ragonier Inc.* v. *United States*, *supra*, 352 U. S. 315, 320, where this Court said that "we cannot say that Court's interpretation of

Washington law was wholly free from its erroneous acceptance of the statements in *Dalehite*", decided by this Court.

3. Long before enactment of the Act of August 5, 1947 (34 U. S. C. sec. 522e) the New York statute had provided for many years, in New York Tax Law, 59 McKinney's Consol. Laws of New York, Part I, sec. 3 that:

> "All real property within the State is taxable *unless exempt from taxation by law*" (Italics ours)

and in sec. 4 that:

> "The following property shall be exempt from taxation:
>
> 1. Property of the United States *except property subject to taxation under the Constitution and laws of the United States*". (Italics ours)

Thus, long in advance of the Congressional Act of August 5, 1947, New York thus had statutorily recognized and had built its laws upon the authority of the United States to *make* government property "subject to taxation under the Constitution and laws of the United States". If State authorization were needed, this constituted authorization by the State of New York for the Congress to *make* the property or any part thereof or interest therein "subject to taxation under the Constitution and laws of the United States", and therefore taxable by Petitioners, when made subject thereto by the United States.

The Act of August 5, 1947, 34 U. S. C. secs. 522a and 522e, reads as though designed to be interwoven directly with these already existing New York provisions, in providing in sec. 522a for the future making of leases deemed "advantageous to the Government" or "in the public interest", and in further providing, in sec. 522e, as respects each leasehold authorized to be made, that:

> "The lessee's interest, *made or created pursuant to* the provisions of sections 522a 522c and 522e of this title, shall be *made* subject to State *or local* taxation". (Italics ours)

Both statutes use the words "subject to" taxation by local governments, and use the concept of this being controlled by Congress. By precisely the same words "subject to", the State Act first surrendered control to Congress, and Congress then exercised the same so that the "lessee's interest", as soon as "made", is "made subject to . . . local taxation".

The *Report on Federal Contributions to States and Local Governmental Units With Respect to Federally Owned Real Estate*, House Document No. 216, 78th Congress, 1st Session, submitted in 1943, four years after appointment of the Federal Real Estate Board by Executive Order No. 8034, had emphasized repeatedly differences between State and "local" tax losses and problems, and the necessity of providing directly for the latter. The Report states (pp. 17-18):

> "In practically all cases, the sites for the establishment of these war projects have been suddenly and unexpectedly removed from the *existing tax structure of the local communities* and their removal results in a direct loss of tax revenue. . . .
>
> ". . . Over a period of years, *local* governments can be expected to adjust to Federal ownership of those recent acquisitions which are retained. Temporarily, however, there is a valid distinction and a case for special treatment.
>
> "The recent acquisitions have occurred abruptly; they have seriously affected the tax base of many *local* governments; and no one knows now which parcels will be retained and which will be transferred to other uses after the war. Some arrangements seem, therefore, to be desirable to tide *local governments* over the transitional period, enabling *them* to continue *their* necessary services without disruption and to meet *their* financial obligations without excessive burdens upon *their* remaining taxpayers." (Italics ours.)

In some cases:

> "A direct payment is made *to the counties* equal to the *county portion* of the former property tax as defined above" (p. 35).

Congress, therefore, intended full effectiveness for the words "shall be made subject to State *or local* taxation" in the Act of August 5, 1947, 34 U. S. C. sec. 522e, and consequently in Respondent's Federal contract.

Congress could, of course, have made the whole property locally taxable; and it is not disputed that had it done so, secs. 3 and 4 of the New York statute read together with such a Federal statute would effectively empower Petitioners to assess the tax. In such case Respondent would pay its part of the tax in the rent it paid. But it was for the United States to determine what should be advantageous to the Government or in the public interest, and what part of the whole should be "subject to taxation under the Constitution and laws of the United States". The whole comprehends the parts, and the part represented by the "lessee's interest" represented, because it was "made or created" as a severed interest, a part of the real property of the United States, made subject to its local taxation. For such reason Respondent pays less rent than would be the case if its lessee interest had not been made subject to tax.

4. The reasoning of the Court of Appeals majority is as though the State, in order to consent to the Town taxing, had to act *after* Congress acted; whereas both the State and Federal statutes evidence the contrary, and evidence that Congress and the Government contracting official, in in contracting unqualifiedly the amount of rent to be received from Respondent, acted in recognition of an obligation of Respondent to pay taxes locally to Petitioners on the "lessee's interest". Instead of the State withholding and Congress and the Federal contracting official recognizing a State veto or complementary power, to be exercised

only by later State statute, the State had previously recognized and Congress and the Federal contracting official then exercised a power, unimpeded by the State, to make the "lessee's interest" of Respondent subject to local taxation by Petitioners.

5. Moreover, "The power was called into action" by the making of the contract by Respondent; thereby Respondent "put the act into operation, and voluntarily subjected themselves to its provisions"; and there is applicable the principle that "The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid" (cf. *Wight* v. *Davidson*, 1901, 181 U. S. 371, 377). Respondent accepted its contract expressly subject to local taxation of its "lessee's interest", thereby consenting to local taxation thereof by Petitioners. This was for benefit of the "local" government.

6. Respondent, moreover, is not a mere general taxpayer, as to whom the sole "consideration" for its tax liability is local government protection of citizens and residents, but is one "specially and peculiarly benefited" by its Government contract, as a special consideration for its obligation to pay the Petitioners a tax (cf. *Illinois Central Railroad* v. *Decatur*, 1893, 147 U. S. 190, 198-199). Consequently, this is special reason why the principles of construction to be applied require strict construction *against the Respondent*, and resolution of all doubts *in favor of the Town* (cf. *Illinois Central Railroad* v. *Decatur*, *supra*; *Ford* v. *Delta & Pine Land Co.*, 1897, 164 U. S. 662; *Durham Pub. Service Co.* v. *City of Durham*, 261 U. S. 149; *Cleveland El. Ry. Co.* v. *Cleveland*, 204 U. S. 116).

A principal difference between the reasoning of the majority of four and minority of three in the Court of Appeals and between Petitioners' and Respondent's contentions is the application by the majority and argument by Respondent of *strict* construction *against* the Town, and by

the minority and by Petitioners of a *liberal* construction *in favor* of the Town. This is a matter not merely of State law and State interest, but of Federal law and national interest and importance and should be reviewed and determined by this Court.

Wherefore, Petitioners respectfully pray that a rehearing be granted herein, and that a writ of certiorari be granted as prayed for.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58, par. 2.

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